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No. 82-6933

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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MARION ALBERT PRUETT,)
)
Petitioner,)
)
-against-)
)
STATE OF MISSISSIPPI,)
)
Respondent.)

ON WRIT OF CERTIORARI TO
THE STATE OF MISSISSIPPI

Supplemental Brief And Reply
To Brief In Opposition

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Questions Presented

I. Whether this Court has jurisdiction to consider petitioner's constitutional challenges to his death sentence.

II. Whether the introduction of highly prejudicial and inflammatory evidence during the sentencing phase a petitioner's capital trial violated the harmless error standard established by this Court in Barclay v. Florida, No. 81-6908 (U.S. July 6, 1983).

I. THIS COURT MAY CONSIDER WHETHER PETITIONER'S DEATH SENTENCE WAS UNCONSTITUTIONALLY DETERMINED

A. Introduction

Even though respondent received two extensions of time from this Court, which permitted it some ninety days to consider the serious constitutional questions presented by petitioner in his Petition for Writ of Certiorari, in its opposition, the State of Mississippi obstinately refused to "engage in a discussion of the merits," Brief in Opposition at 10, of petitioner's constitutional challenges to the proceedings whereby he was sentenced to death. Respondent's "infinitely clear," id., position succeeds in demonstrating respondent's lack of appreciation for the human life which hangs in the balance and the constitutional considerations that attend decisions of such enormity. The State would deprive this Court of jurisdiction to consider petitioner's substantive constitutional challenges merely because petitioner allegedly did not articulate his challenges now presented in precisely the same manner below.

First, even had petitioner's constitutional challenges not been presented below, this Court would have jurisdiction to consider these challenges. Further, petitioner's jurisdictional argument was presented and considered by both the Mississippi trial court and the Mississippi Supreme Court. Finally, petitioner's contention that the prosecutor's closing argument was inflammatory and highly prejudicial was also considered below.

B. This Court Would Have Jurisdiction To Consider Petitioner's Constitutional Challenges to His Death Sentence Even If These Challenges Had Not Been Presented Below

The State cites Webb v. Webb, 451 U.S. 493 (1981) as its leading authority for the proposition that petitioner's failure to intone below the word "constitutional" in his challenge involving a jurisdictional dispute between two sovereign states precludes this Court's consideration of the issue. The State fails to note, however, that in the very same case, this Court specifically stated that it has "jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness." Webb v. Webb, 451 U.S. 493, 502 (1981) (Powell, J., concurring). Further, this Court previously has reached issues which were "not raised on appeal below or included as a question in the petition for certiorari." Wood v. Georgia, 450 U.S. 261, 265 n.5 (1981). In Wood, the Court concluded that "[w]here, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue." Id. at 264-65 (footnote omitted). See also Vachon v. New Hampshire, 414 U.S. 478 (1974) (allowing the Court, at its option, to notice plain error not presented). Cf 28 U.S.C. § 2106; R. Stern & E. Gressman, Supreme Court Practice § 6.27 (5th ed. 1978). Thus, there is ample authority supporting this Court's ability to address issues which were not raised below.

Such due process concerns are even more compelling in capital cases where human life is at stake. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion);

Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); id. at 306 (Stewart, J., concurring); id. at 316 (Marshall, J., concurring).

> When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957); (Harlan, J., concurring in result.) Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

This Court has traditionally undertaken "extraordinary measures" to guarantee "as much as is humanly possible" that a death sentence has not been imposed by "mistake," Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

C. Petitioner's Jurisdictional Argument Was Presented And Considered By Both the Mississippi Trial Court And The Mississippi Supreme Court

As the State of Mississippi has noted, petitioner did not add the obvious word constitutional to the jurisdictional issue raised in the court below. Petitioner is hard pressed to understand how the state may, in good faith, argue that a dispute between the states of Alabama and Mississippi over the proper jurisdiction of a capital offense is anything but a constitutional issue. It seems more than unreasonable to refuse to even discuss an issue with a human life at stake, merely because a situation was not given its obvious label. The State argues that this Court is without jurisdiction to consider petitioner's meritorious jurisdictional argument, merely because petitioner failed to incant the word "constitutional" in the proceedings below. Respondent clings to absurd argument despite the fact that, by the State's own admission the jurisdictional issue was raised during the trial court proceedings.

Respondent errs in its contention that petitioner was required to use the word "constitutional" in order to enable this Court to now consider his challenge to Mississippi's assertion of jurisdiction. In Street v. New York, 394 U.S. 576 (1969), this Court noted the controlling principle established in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928), which held:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

Id. at 67. As jurisdictional issues always raise constitutional considerations petitioner's jurisdictional challenges below met this standard of Street and Zimmerman. As Justice Marshall noted,

> I share the Court's concerns for comity and for careful pleadings. Nonetheless, I do not believe that either of these concerns justifies the Court's apparent conclusion that a petitioner who fails to cite the exact location of a federal constitutional provision has neglected to raise a claim on that ground.

Webb v. Webb, 451 U.S. at 502 (1981) (Marshall, J., dissenting).

D. Petitioner's Constitutional Claims Concerning The Prosecutor's Prejudicial And Inflammatory Statements During The Sentencing Proceedings Were Obvious From The Record And Reviewed By The Mississippi Supreme Court

The State of Mississippi argues that petitioner's failure to raise the issue of the unconstitutional introduction of prejudicial and inflammatory statements during the sentencing phase of his trial deprives this Court of jurisdiction to consider the sue.

What the State conveniently ignores, however, is this Court has stressed "the further safeguard of meaningful appellate review" to avoid the arbitrary and capricious imposition of the

death penalty. Gregg v. Georgia, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, J.J.). "If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings." Barclay v. Florida, slip op. at 15 (Marshall, Brennan, JJ., dissenting) (emphasis added).

To comply with these sentiments, the Mississippi Supreme Court has taken upon itself a thorough review of the entire record in death penalty cases. The Mississippi Supreme Court has recognized that "meaningful appellate review" is necessary to assure that the death penalty will not be wantonly or freakishly imposed, but will only be inflicted in a consistent and even-handed manner under like or similar circumstances. Jackson v. State, 337 So.2d 1242 (Miss. 1976).

The Mississippi Supreme Court elaborated on this point in Irving v. Mississippi, 361 So.2d 1360 (Miss. 1978):

> We recognize that thoroughness and intensity of review are heightened in cases where the death penalty has been imposed. Augustine v. State, 201 Miss. 731, 29 So.2d 454 (1947). What may be harmless error in a case with less at stake becomes reversible error when the penalty is death. Forrest v. State, 335 So.2d 900 (Miss. 1976); Russell v. State, 185 Miss. 464, 189 So.90 (1939). Therefore, we have given careful scrutiny to the proceedings in the trial below in order to determine whether accused received a fair trial and without necessary regard to whether technical basis for preserving error was made by counsel.

Applying these standards in Voyles v. Mississippi, 362 So.2d 1236 (Miss. 1978), the Mississippi Supreme Court stated: "Under the requirements for appeal and review by this Court of all capital murder convictions, the Court has studied carefully every aspect of the case -- whether or not such were discussed in the briefs submitted." Id.

Indeed, in reviewing petitioner's case, the Mississippi Supreme Court "carefully considered the entire record in the cause together with all briefs, instruments appearing as evidence, exhibits, and everything required of an appellate court." Pruett v. Mississippi, 431 So.2d 1101 (Miss. 1983). Thus, the Mississippi Supreme Court reviewed all of the proceedings below to determine whether there were any defects in petitioner's capital trial. The Mississippi Supreme Court's silence regarding the prosecutor's prejudicial and inflammatory statements must be construed as holding that these statements were not constitutionally offensive. Thus, albeit obliquely, petitioner's current contention that the prosecutor's statements were constitutionally impermissible was considered and rejected by the Mississippi Supreme Court. Therefore, this argument was raised and preserved below.

II. THE INTRODUCTION OF INFLAMMATORY AND HIGHLY PREJUDICIAL STATEMENTS DURING THE PROSECUTOR'S CLOSING ARGUMENT VIOLATES THE HARMLESS ERROR DOCTRINE ESTABLISHED IN BARCLAY v. FLORIDA, NO. 81-6908 (U.S. July 6, 1983)

In Barclay v. Florida, No. 81-6908 (U.S. July 6, 1983), which was decided after petitioner filed his petition, this Court approved a test which requires a "harmless error" analysis whenever improper aggravating factors are introduced into the sentencing phase of a bifurcated death penalty trial. Id., slip op. at 14.[1/] "As one might surmise from the terminology, a 'harmless error' inquiry refers to a process by which an appellate court identifies legal errors and then determines whether they could have affected the judgment being reviewed."

1/ The Mississippi capital murder statute is substantially similar to the Florida statute considered in Barclay v. Florida.

Barclay v. Florida, slip op. at 17 (Marshall, Brennan, JJ., dissenting).

In his petition for a Writ of Certiorari the petitioner argued that the repeated introduction by the prosecutor of inflammatory and prejudicial statements as justification for a death sentence was unconstitutional, and petitioner catalogued an abundance of such statements. (Petition at 23-26).

In light of Barclay, petitioner recasts his arguments in his Petition for Writ of Certiorari as claiming that the repeated prejudicial statements made during the prosecutor's closing argument are clearly in excess of harmless error standard in Barclay.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

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Dated: September 22, 1983

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* It was Mr. Pruett's original intention to file his petition pro se with the assistance of two inmate legal advisors at Mississippi State Penitentiary and an attorney advisor. However, he has authorized counsel to file this Supplemental and Reply Brief on his behalf, because he asserts he has had insufficient time in the law library to prepare his own petition.

CERTIFICATE OF SERVICE

I, the undersigned, a member of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi was served upon the respondent by mailing a copy to Assistant Attorney General, William Patterson, 450 High Street, Carroll Gartin Building, Fifth Floor, Jackson, Mississippi 39205, this 22nd day of September, 1983.

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